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Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Comments by the World Bank

Note by the Secretariat

The World Bank submitted to the Secretariat a paper for consideration at the fifty-first session of the Commission. The paper is reproduced as an annex to this note in the form in which it was received by the Secretariat.

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The World Bank appreciates the opportunity to review the draft revised Introduction, Chapter I, Chapter II and Chapter III of the updated Guide. We would like to commend the Secretariat, as well as the experts who collaborated to provide inputs, on the draft revised text. The updated Guide will provide an important and timely contribution of critical information for governments, policymakers and other stakeholders operating in the realm of PPPs. Having reviewed the revised drafts referred to above, the World Bank's comments are as follows and focus on Chapter III (Contract Award).

Chapter III Contract Award	
Paragraph reference	Comments
15	Consideration could also be given to the transparency and publication of awarded contracts, and the performance thereof. There is a trend for countries to have laws requiring disclosure of such information and/or for the publication of contracts for public projects (which may in some cases exclude sensitive and proprietary information).
17	The structure proposed for a private partner that is not selected competitively to then select the construction contractor competitively is not an ideal structure and should be seen as sub-optimal. If it is to be discussed here, the challenges created by using such an approach need to also be discussed in detail, so that readers don't assume that since the World Bank may permit such an approach, that it is therefore optimal or preferred. As was recently carried out by the World Bank on the topic of unsolicited proposals (https://library.pppknowledgelab.org/documents/4580), in order to inform the development of guidelines, there should be case study analysis before recommending this approach to see if it brings value for money or other benefits. The unsolicited proposal analysis showed that there are fewer benefits achieved in practice than had previously been assumed, and that there are significant downsides if not well-managed. In our experience, we have seen examples where the approach of competitively subcontracting was used — but this led to high EPC (engineering, procurement and construction) prices since the concessionaire was not incentivized to keep prices low. Such approach also poses challenges for long term sustainability of the relevant project given that project proponents will typically have partners that they work with — and forcing them to work with others may not be sustainable.
23	In PPPs, whole life-cycle costs should also be considered. It is recommended for construction projects to follow this approach also, but it is even more relevant when bidders are free to offer a range of technical proposals to meet the outputs, some of which may be much costlier to operate than others.
36	While *Development Business* is one possible medium of communicating pre-selection processes, it is not the best way to attract international bidders. Parties looking at *Development Business* are generally construction contractors, not necessarily those concession or PPP bidders that the contracting authority will want to attract. Industry journals, conferences, embassy websites and international newspapers are far more effective media.
42	Generally speaking, joint and several liability is not an appropriate requirement for PPP or similar projects as they are long term arrangements and consortium members, particularly the construction member, will want the flexibility to exit the project after a reasonable period. In the case of the consortium member the construction warranties will benefit the project vehicle and/or the employer for the period thereof (typically 10 years). One approach is to require joint and several liability if and until the consortium members form and capitalize an SPV and the SPV enters into the PPP agreement.

	It is not clear why the contracting authority would require an SPV after award as an alternative to joint and several liability. An SPV is the likely approach that joint venture partners will follow as it is a mechanism for achieving limited recourse to their balance sheets (hence the difficulty with imposing joint and several liability on each member), for project financing structures, and perhaps for reasons of tax and (for foreign investors) repatriation of profits through dividends. Governments may see advantage in a special purpose vehicle for a long-term contract where there is significant private financing to ensure that the contracting party does not have other activities or legacy liabilities (i.e., so it is clean) and/or to ensure that the contracting party is incorporated in the jurisdiction of the project (if the lead member of the consortium is not).
53–68	Care needs to be taken in "best and final offer" ("***BAFO***") scenarios that the same information is shared with each bidder, so as to ensure a level playing field. This can be difficult to achieve in practice, even in countries which are familiar with the BAFO process. It should be approached with caution in less developed countries. Generally, competitive dialogue can be challenging for less developed countries, where the direct negotiation of different stages can result in perceptions of impropriety or corruption.
66 onwards	Somewhere there should be a reference to developing a data room (virtual or other); and for pre-bid meetings. There is likely to be a lot of information to be shared with bidders.
74 and 95	In order to limit to a minimum any negotiation of terms once a preferred bidder is selected, it is considered best practice to include a full PPP agreement with the request for proposals, with the opportunity for only very limited amendment on non-substantial terms.
83	Evaluation should look at financiers, the level of due diligence performed, the extent of their commitment and the distance and time to financial close. Transparency should allow increased levels of public accountability to ensure better community engagement, and reduction in abuses of the procurement and implementation processes.
100	The process of allowing a contracting authority to bypass competitive processes must be subject to review and approval of an oversight body, possibly the cabinet/executive agency or a similarly high-level body tasked with reviewing the proposed project and the justification for direct negotiation, whether further to unsolicited proposals or otherwise. In relation to (d): if this is allowed, it needs to be carefully worded as it has been used as an excuse in many projects to allow sole sourcing — but in reality, there are very few circumstances where use of an exclusive technology is truly necessary.
124	Mechanisms such as the "Swiss challenge" procurement method have been shown to be anti-competitive — a recent PPIAF and World Bank report reveals that there are few cases where competitive bids are submitted by bidders other than the proponent as there is a perception of a lack of level playing field and likelihood that the project will go to the proponent.
126	While project proponents will always be keen to stress the innovative aspects of a project, it is seldom the case that a project is in fact that innovative — this premise should be used with great caution.